IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

STATE OF ILLINOIS, by its Attorney General LISA MADIGAN, Plaintiff, v. DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHST AKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD., Defendants.	)	No. 02CH19575 *Parens Patriae*/Class Action

MEMORANDUM IN SUPPORT OF ILLINOIS' MOTION
FOR FINAL APPROVAL OF SETTLEMENTS

Plaintiff State of Illinois respectfully submits this Memorandum in support of its Motion for Final Approval of Settlements. The proposed settlements provide for payments totaling just over $1,600,000. The settlements resolve all claims brought by the State of Illinois on behalf of itself, its political subdivisions and its natural citizens as indirect purchasers of sorbates.

For the reasons set forth below, the proposed settlements are fair, reasonable and adequate; sufficient notice has been given and the response of the class is supportive of approval of the settlements; and the plan for distribution of the proceeds *cy pres* is warranted by the difficulty and excessive administrative cost of a direct distribution to consumers. Consequently, the State requests this Court to grant final approval of the settlements.

BACKGROUND

I. Nature of the allegations

The State of Illinois brought this action on behalf of itself and its political subdivisions, and as class representative and *parens patriae* on behalf of its natural citizens,[1] seeking damages and civil penalties. The State alleged that such indirect purchasers of sorbates within the State of Illinois were harmed as a result of illegal overcharges arising from a pervasive and harmful price-fixing conspiracy engaged in by the defendants.

Sorbates are non-toxic chemical preservatives, used as mold inhibitors in high-moisture and high-sugar food products, such as cheese and other dairy products, baked goods and other processed foods. Sorbates also are used in various beverages, and other products, including household products such as shampoos. Worldwide sales of sorbates are roughly $200 million annually.

The State alleged that, beginning in or about January 1979 and continuing until in or about June 1997, the defendants and their named and unnamed coconspirators participated in a conspiracy affecting the prices of sorbates sold indirectly in the State of Illinois. Certain of the defendants have pled guilty to federal criminal antitrust charges brought by the United States Department of Justice. These defendants agreed to pay at least $132 million, collectively, in criminal fines to the federal government for participating in the sorbates price-fixing conspiracy. In addition, all or several of the defendants have agreed to settle private actions seeking recovery on behalf of direct purchasers and indirect purchasers in several other states.

---

[1] The State's original complaint sought to represent all of the State's citizens, both natural citizens and businesses. As part of the compromise of this action, the State has filed a motion to amend its complaint to represent only itself, its political subdivisions and its natural citizens. That motion is still pending and the State renews its request that the motion be granted.

II. The Settlements

A. Monetary Payments and Distributions

The State of Illinois has entered into two separate settlement agreements providing for total payments of $1,610,000. The first of these (Exhibit 1) is with all of the defendants except Ueno Fine Chemicals, Ltd. ("Ueno"). These defendants (collectively referred to as the "Group Defendants") are Daicel Chemical Industries, Ltd., Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc., Nutrinova, Inc., Celanese AG, and Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. Under the terms of this Settlement Agreement, the Group Defendants, will pay $1,560,000 into the settlement fund. The second settlement (Exhibit 2) is with Ueno. Under the terms of that settlement, Ueno will pay $50,000 into the settlement fund.

All of these funds have been paid directly to the State, which is holding them pending approval of the Settlements. The Court, when it granted preliminary approval, ordered the funds received to be divided into two accounts. One account (the "Distribution Fund") received $1,250,000, reserved exclusively for the *cy pres* distribution if the Settlements receive final approval (or to be returned to the defendants if the Settlements are not approved). The other account (the "Fees and Expenses Fund") received the remainder of $360,000, to be used to pay the costs of notice and the States' attorneys' fees. If the Settlements do not receive this Court's final approval, the monies from this account would be returned to the defendants less notice costs. If the Settlements are approved, any funds not used from this account are to be added to the Distribution Fund.

As part of this motion, the State is requesting reimbursement of its Notice costs from the Fees and Expenses Fund in an amount of $95,817.47. The services obtained for these fees are detailed

below. This amount is below the $120,000 that was reserved for Notice in the Preliminary Approval Order.

The State is also requesting its attorneys fees from the Fees and Expenses Fund in an amount of $235,000. This amount is reasonable both as a percent of the final recovery and on the basis of the hours expended by the State on this litigation. The amount is below the $240,000 ceiling that the State proposed during preliminary consideration of the settlements.

Because the fees and expenses are below the $360,000 set aside in the Fees and Expenses Fund, by operation of the Preliminary Approval Order, the remainder of the monies in this fund ($29,182.53 if the State's requests are granted) will be distributed under the *cy pres* distribution plan described in detail below if the Settlements are approved.

With this addition of the residual from the Fees and Expenses Fund, there is a total of $1,279,182.53 available for *cy pres* distribution to benefit the members of the class of indirect purchasers. As discussed below, the State is requesting that this money be used to benefit health and fitness interests of the class by using the money to equip the physical education programs of needy public school districts on the State Board of Education's financial watch list.

B. Release of Claims

The Settlement Agreements provide that, upon Final Approval of the Settlements, the State will provide a release to each of the Defendant Settlement groups. (Set. Agrs.¶ VII.A.) Those releases cover claims arising out of the facts alleged in the Complaint, and release each of the defendants and their successors, assigns, parents, subsidiaries, divisions, officers, directors, employees, agents, representatives, related or affiliated entities, and any other person acting on their behalf. (Set. Agrs. Exs. A.) The language of the releases is tailored to release those claims

implicated by the conduct at issue in this case, without barring causes of action unrelated to the Complaint. The releases will be given on behalf of the State, its political subdivisions and the natural citizens of the State.

ARGUMENT

I. The Court Should Grant Illinois' Motion for Final Approval Because the Proposed Settlements are Fair, Reasonable and Adequate

A. The Attorney General of Illinois Can Fairly and Adequately Represent the Interests of the Settlement Group

Under 735 ILCS 5/2-806, a representative of a class may, with court approval, settle the claims of the represented class. Also, under the Illinois common law, the State may act as *parens patriae* to represent the claims of its citizens when the conduct at issue implicates a quasi-sovereign interest of the State. *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972). Indeed, under 740 ILCS 10/7(2), the Attorney General is the party expressly authorized to act in a representative capacity on behalf of indirect purchasers making claims under the Illinois Antitrust Act.

A Class should be certified if it meets the four prerequisites of Section 2-801. In the present case, it is clear that all four prerequisites are met since: (1) "[t]he class is so numerous that joinder of all members is impracticable," (2) "[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members," (3) "[t]he representative part[y] will fairly and adequately protect the interest of the class," and (4) "[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801 (2004).

1. Numerosity. While the number which satisfies the numerosity requirement depends on the particular circumstances of each case, *In re Application of Rosewell*, 236 Ill. App. 3d 165, 174, 603 N.E.2d 681, 686 (1st Dist. 1992), there can be no dispute but the class in the present case has more than sufficient members. Illinois cases have recognized that classes with as few as one hundred and fifty class members may fulfill the numerosity requirement. *See*, *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 594, 410 N.E.2d 902, 913 (1st Dist. 1980). Here, the Class consists of all individuals who purchased many common food or household products, which would be virtually all of the over twelve million residents of Illinois. Joinder of all of these individuals is not only impractical, but impossible.

2. Predominance of common questions. Nor is the commonality and predominance requirement of section 2-801(2) less clear in the present case. To satisfy this prerequisite, there must be questions of fact or law common to the class that predominate over the individual claims of the class members. A common question may be established when either the claims of the individual class members "are based on the common application of a statute or they were aggrieved by the same or similar wrongful act." *McCarthy v. LaSalle Nat'l Bank & Trust Co.*, 230 Ill. App. 3d 628, 634, 595 N.E.2d 149, 152-53 (1st Dist. 1992).

A common question of law or fact predominates "if it is so important that, in a very practical effect, it disposes of the entire controversy leaving only minor issues to be resolved in individual circumstances." *Nebel v. City of Chicago*, 53 Ill. App. 3d 890, 902, 369 N.E.2d 74, 83 (1st Dist. 1977). Furthermore, "in order to determine whether a common question of fact or law predominates over other questions affecting only individual members, we must determine whether the successful

adjudication of the plaintiff's claim will establish a right to recover in other class members." *Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16, 18, 424 N.E.2d 59, 61 (1st Dist. 1981).

In this case, common questions abound, including the following:

(a) whether Defendants entered into agreements, combinations and/or conspiracies affecting the price of sorbates sold indirectly in the State of Illinois;

(b) whether retail price was artificially raised and maintained as a result of these agreements, combinations and/or conspiracies;

(c) whether these agreements, combinations and/or conspiracies violated the Illinois Antitrust Act; and

(d) whether these agreements, combinations and/or conspiracies resulted in ascertainable damages.

While all questions of law or fact need not be held in common by the Class for common issues to predominate, the issues of facts and law common to every plaintiff in this case include almost all the issues involved in the litigation. The clear and overarching core of the allegations is that the defendants and their named and unnamed coconspirators participated in a conspiracy affecting the prices of sorbates sold indirectly in the State of Illinois in violation of antitrust laws. Proof of these conspiracies, and their impact on the market for sorbates, is common to all members of the Class. Even actual damages present common questions since the amount of overcharge passed through to consumers would be common to the class, with individual damages being a mechanical multiplication of each individual's purchases by the percentage passed through.

3. Adequacy of Representation. The third requirement of section 2-801 is adequacy of representation. Crucial to a conclusion of fair and adequate representation is a determination that

"'the party's attorney be qualified, experienced and generally able to conduct the proposed litigation'" and that "'the likelihood that the litigants are involved in a collusive suit or that the plaintiff has interests antagonistic to those of the remainder of the class'" be eliminated as much as possible. *Spirek v. State Farm Mut. Auto. Ins. Co.*, 65 Ill. App. 3d 440, 451-52, 382 N.E.2d 111, 119 (1st Dist. 1978) (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2nd Cir. 1968)).

In the present case, the class representative is the Attorney General of Illinois, already charged with the representation of the citizens of the State. The Illinois General Assembly has expressly vested the right to bring representative actions in the State's Attorney General. 740 ILCS 10/7(2). As one court noted, it would be "difficult to imagine a better representative of the retail consumer within a state than the state's attorney general." *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 280 (S.D.N.Y. 1971). The Attorney's General "representation of the class provides the class with experienced counsel possessing sufficient resources and professional assistance to meet the obligations inevitably placed on a representative party." *Id*. at 281.

4. Efficient Adjudication. The final requirement of section 2-801, that the class action serve "as an appropriate method of action for the fair and efficient adjudication of the controversy," is satisfied if the "class action would best serve the 'economies of time, effort and expense and promote the uniformity of decision and accomplish the ends of equity and justice sought to be attained in these actions.'" *Spirek*, 65 Ill. App. 3d at 452, 382 N.E.2d at 119 (quoting Forde, *Illinois' New Class Action Statutes*, 59 Chicago Bar Rec. 120, 125 (1977)). In this case, a representative action is superior to any other alternative for disposing of the predominating issues. The only alternative to a representative action by the Attorney General would, under the Illinois statute, be twelve million individual suits, resulting in mass duplication of litigation and waste of judicial resources. To

preserve those resources, and expedite resolution of this case, the class should be certified under Section 2-801.

B. The Settlements Meet the Standards Commonly Recognized for Approval of Settlements Affecting a Class of Consumers

"Approval should be given if the settlement offer is fair, reasonable, and adequate." *People ex rel. Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill. 2d 303, 317, 335 N. E.2d 448, 456 (1975). In a case such as this one involving complex issues, "That some alteration in the agreement may have been more beneficial to certain interests is not the test. The trial judge must view the settlement as a whole, considering all relevant factors in assessing the compromise." *Id.* at 319, 335 N.E.2d at 457.

In evaluating the settlements, the Court should consider (1) how the settlement was reached and whether it was tainted by collusion or bad faith; (2) the benefits to the class members relative to potential proof problems, strength of defenses, and costs of continued litigation; (3) the extent of investigation and the status of the case at the time the settlement was reached; (4) the recommendation and experience of counsel; and (5) the extent of opposition to the settlement and the reasons therefore.[2] As set forth below, consideration of each of these factors strongly weighs in

---

[2] See, e.g., *Chicago v. Korshak*, 206 Ill. App. 3d 968, 972, 565 N.E.2d 68, 70-71 (1st Dist. 1990), where the court identified several considerations for approval of settlements, including:

> (1) [T]he strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed.

favor of approving the proposed settlement. The value of the settlements will outweigh the expenses of continued litigation and will benefit all members of the class.

1. The Settlements Were the Result of Intense, Arms-Length Negotiations. The negotiations of these settlements took several months to complete with numerous face-to-face and telephone negotiations. These negotiations were lengthy and complex and involved the individual interests of each of the eight defendants. The parties were at all times in vigorously adversarial positions as evidenced by both sides rejecting substantial elements of the other side's proposals during the course of negotiations. The settlement structure now presented to the Court represents a good faith effort to reach a fair compromise.

2. The Balance Between the Benefits to the Class Members and the Costs and Risks Involved in Continued Litigation Weigh Heavily in Favor of Approving the Settlements. At the time of the settlement, the parties had been litigating a variety of motions to dismiss for over a year. These motions included questions of jurisdiction, the parties being represented and the effect of the Statutes of Limitations on the claims of Illinois and the parties it sought to represent. As this Court has already noted, some of these motions presented significant and difficult issues. Continued litigation of these issues, as well as the various issues presented by the merits of the case, presented significant risks for both sides that these settlements serve to compromise.

Just these preliminary issues had imposed significant costs on both sides. Continued litigation was only going to increase these costs. Resolution of this matter where more funds are available to the members of the class, rather than going to costs or fees for the attorneys, benefits the public.

In addition, these settlements compare favorably with settlements approved by courts in other States. For example, in the most recent settlement which was with the State of Ohio, the total settlement including both the consumer recovery and attorneys fees was $505,000. *Ohio v. Daicel Chemical Industries, Ltd.*, 02cvh-10-12064 (Court of Common Pleas, Franklin County, Ohio). This was for a State with only a slightly smaller population than that of Illinois. However, the statutory basis for Ohio's claims are arguably different than in Illinois.

Perhaps more comparable settlements are presented by the cases in Wisconsin (*Kelley Supply, Inc. v. Eastman Chemical Co.*, 99CV001528 (Circuit Court, Dane County Wisconsin)) and Tennessee (*Orlando's Bakery v. Nutrinova Nutrition Specialities & Food Ingredients, GmbH*, 99-560-II (Chancery Court, Davidson County, Tennessee)) . In Wisconsin, a class action was brought on behalf of both the individual and commercial indirect businesses in Wisconsin and eleven other states with a combined population roughly three-and-one-half times the size of Illinois. The $8,700,000 settlement provided a breakdown between the consumer recovery, the commercial recovery, and the attorneys' fees. When these recoveries are adjusted for the difference in population, the attorneys' fees recovered in Wisconsin significantly exceed those requested here, but the consumer recovery is equal to approximately $940,000. If similar ratios are applied to the Tennessee settlement, where only one state's indirect purchasers were suing these defendants, the total Tennessee recovery of $1,425,000 would represent an individual consumer recovery of just over $1,205,000 when adjusted for Tennessee's smaller population. In comparison, the consumer recovery in this case will be at least $1,250,000 - larger than in either of these two comparable cases.

3. <u>The Litigation and Background Investigation Allowed for a Fair Evaluation of the Strengths and Weaknesses of the Parties' Cases</u>. Prior to filing this case, Illinois was involved in

multistate negotiations that attempted to resolve this case and related cases in other states without the need for litigation. During these negotiations, the parties exchanged basic information. Thus, even before the litigation had begun, Illinois did not enter into these settlements until it had reviewed the proceedings and materials from the preceding criminal investigation. Moreover, Illinois did not renew settlement discussions until over a year had passed since the filing of the complaint, during which time jurisdiction discovery had been completed and numerous jurisdictional and procedural motions had been briefed. More information regarding the level of sales into Illinois was obtained during jurisdiction discovery, thereby allowing further evaluation of the potential range of damages.

It was against this background of information, that allowed all parties to knowledgeably assess the merits of the claims, that settlement negotiations of this case began. The parties were well situated to evaluate their likelihood of success on the merits of the major issues.

4. The Settlements Are the Result of the Work of, and Are Recommended by, Experienced Counsel. Counsel representing all parties in this litigation are experienced litigators and knowledgeable in the antitrust and other issues that the case presented. All of these counsel are recommending approval of the settlements.

Counsels' recommendations are even more compelling in this case because the Attorney General has concluded that the final resolution in this case is fair, adequate and reasonable. This determination by public law enforcement officers weighs in favor of approval. *See, e.g., New York v. Reebok Int'l, Ltd.,* 96 F.3d 44, 48 (2d Cir. 1996) (noting that the motivating factor for states acting as *parens patriae* for their citizens is the enforcement of the antitrust laws); *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("[T]he participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected."); *In re Mid-Atlantic*

Toyota Antitrust Litig., 564 F. Supp 1379, 1386 (D. Md. 1983); *see also*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (court may place "greater weight" on opinion of counsel "in addressing a settlement negotiated by government attorneys committed to protecting the public interest").

5. Despite Adequate Notice, There Has Been No Negative Reaction from the Class Members. As provided in the Notice Plan approved by the Court, notice was provided to the class through a variety of media. The short form notice was published in 45 Illinois newspapers, including four Spanish-language newspapers.[3] These papers had a total circulation of over 2.5 million and were dispersed geographically throughout the state. Affidavit of Wayne L. Pines (Exhibit 3, hereinafter "Pines Aff.") ¶6.

In addition, an Internet Banner was run on Weather.com for all Illinois visitors to that web site for two weeks. Pines Aff. ¶7. A press release was distributed to 252 Illinois radio stations by the North American Precis Syndicate Inc. Pines Aff. ¶9.

The Attorney General's office also publicized the settlements. On August 10, the office issued a press release describing the settlements. *See*, Pines Aff. ¶8. Also, the office maintained a link on the Attorneys's General web site, to information on the settlement, including both the short form and long form notices, in both English and Spanish, throughout the notice period. *See*, Exhibit 4. The combination of all these notice efforts, in the opinion of an expert on notice programs, "effectively reached out to members of the class" and "provided a reasonable opportunity for members of the class to learn about the settlement." Pines Aff. ¶ 10.

[3] The short form noticed was translated into Spanish for these four publications.

Despite the extensive notice efforts, the Attorney General received only two letters, written on behalf of three class members. None of these letters voiced any opposition to the settlements. Instead, they only inquired as to whether individual claims would be compensated directly.[4] While the time for objections will not run until December 15, 2004, the time to opt out has run and we have received no opt out requests. The fact that only a small number of class members elect "to opt-out is testimony . . . that the class believes the settlement is fair." *GMAC Mtge. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 497, 603 N.E.2d 767, 775 (1st Dist. 1992).

In sum, each of the factors to be considered in evaluating a settlement demonstrate that these settlements should be approved.

II. The *Cy Pres* Distribution is Fair, and Superior to Direct Consumer Distribution

Numerous courts have found *cy pres* distribution to be appropriate when it not economical or feasible to distribute the settlement proceeds to the victims of an antitrust conspiracy. Where the administrative cost of identifying claimants and apportioning and distributing the funds would quickly outstrip the restitution actually available to consumers, *cy pres* distributions are considered to be the more desirable approach to compensating the victims of the conspiracy. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 529, 523 (D. Md. 2002); Robert E. Draba, Article, *Motorsport Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loyola Consumer L. Rev. 121, 128-31 (2004); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Actions*

[4] This office responded to the inquiries from two of these class members with both a letter explaining that there would be no direct payments to individuals under the proposed settlements and a copy of the long form notice. Efforts to send the same response to the third class member, who was incarcerated by the Illinois Department of Corrections, failed when packages sent to both his return address and his prisoner number were returned as undeliverable and without forwarding information.

Settlements, 60 Law & Contemp. Probs. 97, 129-30 (Autumn 1997). These same factors led the State, after careful consideration, to conclude that a *cy pres* distribution was appropriate in this case.

Here, while identification of claimants may be straightforward, as the sorbates overcharges are alleged to have affected virtually everyone who ate food in Illinois, apportioning and distributing the funds could quickly absorb the entire recovery in administrative costs. Indeed, the costs of simply processing and mailing the checks to the individuals involved could exceed the recovery that each individual received. In such situations, courts have consistently upheld the use of *cy pres* distributions. *See, e.g.*, *Reebok Intl., Ltd.*, 96 F.3d at 49 (approving *cy pres* remedy where average individual damage was less than $4.00); *see also New York v. Nintendo of Am., Inc.* 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (estimating cost of check reimbursement scheme at $5.00 per check).

After considering several alternatives, the Attorney General has decided to recommend distribution of the funds to financially needy schools for their physical education programs. The Attorney's General Office mailed Grant Announcements to the 191 neediest Illinois school districts as designated by the State Board of Education. Each of these districts received a Financial Profile Score[5] of 2.65 or lower resulting in these schools being listed as either Early Warning or Financial Watch districts, the lowest financial ratings issued by the State Board of Education.

---

[5] The Financial Profile Score is based on the State Board's analysis of school districts' Annual Financial Reports. The Score is a composite of five factors:
• Fund balance-to-revenue ratio
• Expenditure-to-revenue ratio
• Days cash on hand
• Percent of short-term borrowing remaining
• Percent of long-term debt margin remaining
See http://www.iasb.com/files/j4050606.htm (last accessed Nov. 9, 2004).

The Announcement requested that each applicant provide a plan with the express provision that the funds be utilized to purchase physical education or sports equipment or for capital improvements to athletic or physical education facilities that would be available to all students in the school. Funding for intermural sports was expressly excluded. The maximum that could be requested by any district was $50,000.

One hundred and four districts responded to this announcement. The Attorney General and her staff are reviewing those proposed projects and will seek to provide a list of districts and projects recommended for receipt of the funds prior to the Fairness Hearing on January 13, 2005.

The focus of this *cy pres* distribution is designed to aid indirect purchasers of sorbates. Such purchasers were harmed by the overcharges they paid on the (primarily) food products that they purchased. By supporting school district's ability to equip their physical education programs, the proposed *cy pres* distribution will benefit such purchasers in the same areas of interest common to such purchasers - health and fitness.

III. The Administrative Costs and Requested Attorneys' Fees Are Fair and Reasonable

The only expenses for which reimbursement is being sought are the costs of the notice program. At the time of the preliminary approval hearing, this Court approved up to $120,000 for the costs of the notice program. As noted above, the notice program placed notices in 45 newspapers (including four Spanish language newspapers), placed banner ads on the Weather.com website for individuals who visited the website to inquire about Illinois weather, and issued a release through North American Precis Syndicate Inc. for Illinois radio stations. Nevertheless, the State working with the notice consultant, was able to complete this program for $95,817.47 - below the figure

already authorized by the Court. (Ex. 5.) This is a very reasonable amount for a very necessary expense and should be approved.

The requested attorneys' fees - $235,000 - are just below those that the State proposed as a cap at the time of preliminary approval and well below those typically awarded in common fund cases. In *Brundidge v. Glendale Federal Bank*, 168 Ill.2d 235, 243-44, 659 N.E.2d 909, 914 (1995), the Illinois Supreme Court held that the "circuit court is vested with the discretionary authority to choose the percentage of the award method or the lodestar method to determine the amount of fees to be granted plaintiffs' counsel in common fund class action litigation." In the present case, the requested fees are supported by both methods.

The requested fees are well under the percentage of recoveries commonly held reasonable in common fund cases. In *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993), the court noted that the award of attorneys' fees is typically between 20% and 30% of the common fund and noted that "The twenty percent figure [sought by plaintiffs' counsel there] is well within the range of reasonable fees in common fund cases." Similarly in *Camden 1 Condominium Assn., Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991), the court noted that the majority of awards fall between 20% and 30% and noted that 25% is becoming the benchmark. Indeed, in *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 925-26, 654 N.E.2d 483, 492 (1st Dist. 1995), the court held that the complexity of the case justified a 33% award.

Here, the State is seeking under 15% of the $1,610,000 award for its attorneys' fees. Fifteen percent of the common fund obtained in the settlements would be $241,500 which, while $6,500 more than the requested fees, would be "well within the range of reasonable fees in common fund cases."

Calculation of the fees under the lodestar approach also supports an award of the requested amount. As shown on the computer printouts of the attorney hours spent on the matter (Ex. 6),[6] two attorneys from the Attorney's General Antitrust Bureau participated in the investigation and litigation of this matter. They spent a combination of just over 800 hours on the case. Applying standard rates based on each attorney's level of experience yields a lodestar of a little over $232,000. While the results obtained in this case exceed those in other cases and while multipliers are often used to reward superior results, the State is not seeking such a multiplier. However, since this motion and request for attorneys' fees is being filed in advanced of the date for objection, the amount request has been rounded up to provide for the time expended in the Fairness Hearing and responding to any objections. This request is well within the range of reasonable fees for a case of this nature.

[6] Along with this motion for Final Approval, the State is also filing a motion to file these hourly records under seal.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the Court grant final approval of the settlements as contained in the agreed Proposed Final Judgment contained in the Exhibits to this Memorandum.[7]

Dated this 15th day of November, 2004

STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS

By: _____

Blake L. Harrop #99000
Senior Assistant Attorney General
Antitrust Bureau
Office of the Attorney General
100 W. Randolph St.
Chicago, Illinois 60601
(312) 814-1004

[7] Exhibit 5.

CERTIFICATE OF SERVICE

The undersigned, being duly sworn upon oath, deposes and states that a copy of the foregoing was served upon counsel on the attached list, at the listed addresses, by first class mail, postage prepaid, on the 15th day of November, 2004.

_____